Response to Call for Evidence

NFC Access

Introduction

The Computer & Communications Industry Association (CCIA) is a not for profit international tech trade association. CCIA has multiple members that operate mobile ecosystems and/or provide digital services that reach UK consumers through those ecosystems.

Many of the questions in the call for evidence assume a certain kind of respondent, e.g. asking about the time it might take "you" to launch a new service using certain kinds of NFC technology. We have therefore provided a general response on the issues raised in the consultation rather than a question-by-question response. We have some concerns about the implications of this for the conduct requirement setting process, which are explained at the end of this submission.

Over time, digital ecosystems trend toward interoperability, and governments can encourage this trend, for example, by procuring open and interoperable products and ensuring that intellectual property law does not impede interoperability. By contrast, mandatory interoperability with overly specific regulation of terms and conditions involves many of the trade-offs seen in regulation of utilities and will tend to undermine innovation and ultimately competition in dynamic digital markets.

Technological solutions

In terms of whether the requirement should specify that Apple provides HCE-only, SE-only or access via either approach, the Competition and Markets Authority (CMA) should be cautious of insisting on particular technological solutions. To the extent that there is any diversity in developer preferences, there will seem to be a short-run improvement in their ability to deploy new services if additional options are enabled. However, this needs to be balanced against:

- **Undermining ecosystem governance -** an important part of the role that Apple plays as a provider of an operating system is to make decisions about how best to improve the value of that ecosystem to its diverse participants. This includes choices over, for example, whether there are greater efficiencies from encouraging developers to pursue common technical approaches for technologies like NFC, or from enabling multiple approaches. Inserting regulators into these design decisions replaces commercial discretion and market discovery (as other ecosystem providers make different choices) with a less flexible regulatory process. Over time this is likely to lead to missed opportunities to improve mobile ecosystems, particularly with regard to technologies like NFC with a wide range of potential use cases and complex potential privacy and security concerns.
- **Additional costs -** there is necessarily additional cost in implementing, including both:
    - costs to the ecosystem operator, if they have to implement additional NFC approaches, but also

    - technical costs in terms of requiring devices and software to have the features needed to accommodate both means of technical access.
- **Complicating the introduction of new NFC technologies -** HCE-only, SE-only or joint might be the relevant question now, but these approaches are not fixed and there is clearly the potential for change over time as new technological opportunities present themselves. Overly specific regulatory requirements risk requiring extensive regulatory negotiation before any new service is brought forward.
- **Undermining the incentive to introduce new NFC technologies -** an expansive technical requirement will mean that a mobile ecosystem operator bringing forward new NFC technologies might have to anticipate that they will then be required to add them to the list of interoperable technologies, raising the level of organisational commitment required and deterring such innovation.

The fact that approaches differ between Apple and Google's mobile ecosystems means that the merits of different approaches can emerge over time, CMA should be wary of forcing this process. Even if a conduct requirement only put an existing approach on a regulatory basis, it would still risk creating a sclerosis in innovation in mobile payments as the innovation process shifted from an engineering- or business-led to a regulatory negotiations-led process.

Pricing

From its origin in the Furman Review (para 2.15) the goal for the DMCC has been to avoid utility-style price regulation where possible. The practical differences between the formerly-nationalised monopolies to which that regime has traditionally been applied and the dynamic mobile payments sector are enormous.

There are well-established challenges in establishing new payments technologies in a mature financial services market such as the UK. Those new technologies need to secure consumer trust and merchant acceptance, while offering a service sufficiently distinctive to attract users for whom physical cards are familiar and often adequate. The primary objective should be to maintain the incentive to invest in such networks and price regulation is likely to undermine that incentive. This would likely impact both Apple's own incentives and the incentives for any other potentially SMS-designated service that could create new pathways for payments innovation.

The same obstacles are a reason to be cautious about overly optimistic views from developers about the potential to increase deployment of new solutions if Apple's approach to NFC access changed. Even if those developers do feel that there are technical challenges created by any particular approach to NFC access, or would find it easier to go ahead without an appropriate charge for that infrastructure, any impacts are likely to be limited by other barriers to the adoption of novel solutions in the context of a UK market where many consumers and merchants may simply prefer to stick with existing solutions (e.g. existing contactless apps, payment cards, or even cash). The CMA should be cautious in its assumptions about the likely impact in its proportionality assessment.

The CMA should also be realistic about the investment Apple has made and the need to maintain an incentive for similar investments. Crucially, both past and future investments have been made in the context of a significant ex ante risk of failure, where there was an uncertain process to secure consumer and merchant acceptance for any change in a mature payments sector. Earlier attempts to establish NFC payments by companies including retailers and telecoms operators with their own significant resources and consumer reach had failed. There is a risk that any cost-modelling approach looks backward in the knowledge that Apple ultimately succeeded in establishing its NFC solutions, rather than assuming a cost of capital that allows for the real prospect of failure such investments face ex ante.

These investments are not a one-time process with ongoing investment needed in response to new technological opportunities, new security threats, and changing consumer preferences and developer opportunities. In the context of voluntary interoperability those kinds of nuances can be addressed on a commercial basis, but that will be much more challenging in the context of regulatory price-setting.

If the CMA does go ahead with regulating prices with respect to NFC access, it should resist the point estimate price controls seen in some traditional utility settings. In other sectors with high investment in risky innovation (e.g. pharmaceuticals) the approach is instead often to consider broad upper and lower boundaries for what pricing might be fair and reasonable, i.e. the CMA could satisfy itself that the pricing is not a prima facie unreasonable reflection of the value provided, without seeking to set specific prices in a sector where this cannot realistically be done without an undue risk of curbing innovation and dynamic competition.

Consultation process

This call for evidence in several cases assumes that the respondent is a developer. Another recent mobile ecosystems call for evidence stated that it was interested in “views from interested parties, particularly UK-based developers.”

While we understand the need for the CMA to engage with particular stakeholder groups to gather specific technical evidence, doing this by expressing a preference over the kind of respondent or including too many questions in a general call for evidence that presume a certain relationship with mobile ecosystems risks deterring responses from a wider pool of stakeholders.

This is concerning when conduct requirements often represent major regulatory interventions and these calls for evidence are in turn often the only meaningful opportunity for many third parties to engage with the merits of the CMA’s proposals. Developers (or those best-placed to respond on their own account to calls for evidence of this sort) are only one of many stakeholder groups with an interest in the effective function of mobile ecosystems. In the context of what are complex, multi-sided markets, the CMA could risk designing a regulatory regime based on feedback from a subset of developers which does not serve the interests of consumers, or the ecosystem as a whole. The CMA should seek evidence from the broadest possible range of stakeholders (including those affected less directly).